MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W., Suite TW-A325
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Docket No. 00-108
(Dual Network Rule)

On behalf of the Minority Media and Telecommunications Council ("MMTC"), transmitted herewith are the original and eleven copies of our Comments.

Respectfully submitted,

David Earl Honig
Executive Director

Enclosures

cc (w/enclosures):

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.658(g)	)	MM Docket No. 00-108
of the Commission's Rules -	)	
The Dual Network Rule	)	

TO THE COMMISSION

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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September 1, 2000

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SUMMARY

A rare exception to the dual network rule is justified to save UPN. For all its faults, duopoly ownership would save a failing network whose survival is critical to minorities. Having attempted without success to find a minority buyer for UPN, MMTC realizes that UPN can only be preserved by an established network with O&Os and efficiencies from duopoly and vertical integration. A Duopolized UPN is better than a Dead UPN.

MMTC also opposes a program separation requirement, at least as applied to UPN. A general audience network's staff's dialogue with UPN's well-integrated, minority-specialist staff would help the general audience network appreciate the importance -- and learn the means -- of addressing issues of concern to minority communities. These staff interactions are the linchpin of the EEO Report and Order's dead-on accurate appreciation of the value of diversity in broadcast employment. The Commission should not countenance -- much less *require* -- program separation between a general audience network and a substantially minority-themed network.

MMTC still has petitions for reconsideration pending in the local TV duopoly and attribution proceedings. The Commission should rule on those petitions now, and assure itself that a network duopoly could not exacerbate any of the anticompetitive, anti-diversity consequences of local duopolies.

* * * * *

DEDICATION: J. ROGER WOLLENBERG

Readers of MMTC's comments in rulemaking proceedings know that we always offer a dedication to a giant in whose footsteps we tread. Last month, one of the greatest and most gentle giants passed on to a better place.

Roger Wollenberg was best known as the principal FCC counsel for Capital Cities/ABC and its corporate successor, and as the Dean of the communications bar. It's less well known that on just two weeks notice, Roger argued and won Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), cited infra at p. 5 n. 14. Metro Broadcasting, which was Justice Brennan's final decision before his retirement, represented the pinnacle of years of effort by the civil rights community to establish racial diversity within the mainstream of American law as a plainly logical rationale for Commission regulation.

Roger did not come to the task as a stranger. For years before and after his famous argument, Roger was a mentor to dozens of members of the MMTC family and a loyal participant in the MMTC Braintrust. In our field, J. Roger Wollenberg was the King of Civil Rights.

* * * * *

The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in response to the Notice of Proposed Rulemaking, FCC 00-213 (released June 20, 2000) ("NPRM").1/

I. On Narrow Grounds, The Commission Should Allow Major Network Ownership Of UPN

The NPRM sought comment on, inter alia, "the effects of the merger of an incumbent network and an emerging network on a viewer's choice of programming options (mass audience vs. niche audience programming) and the likely quality of such program options." Id. at 13 ¶28.

The answer is that a Duopolized UPN is better than a Dead UPN.2/ For all its faults, duopoly ownership would save a failing network whose survival is critical to minorities.

Independent ownership, which means more editorial voices, is preferable to duopoly *if* independent voices are possible.3/ For

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1/ The views expressed in these Comments are the institutional views of MMTC and do not necessarily reflect the views of any individual MMTC officer, director or member.

2/ Many of the arguments herein could apply to UPN and WB, assuming that either or both of them is covered by the dual network rule. However, trade reports make it clear that the dual network question will probably arise first in the case of UPN. See J. Schlosser, "There's still a UPN - for now", Broadcasting and Cable, August 28, 2000, p. 16; J. Lafayette, "Chris-Craft deal leaves Murdoch rife with options, but shelf life for UPN may not be long", Electronic Media, August 28, 2000, pp. 3, 39. Consequently, these Comments relate only to UPN.

3/ The ideal formulation is that "60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated." Multiple Ownership of Broadcast Stations, 22 FCC2d 306, 311 (1970).

that reason, MMTC opposes broad repeal of the dual network rule. Outright repeal of the rule would lead to anticompetitive, diversity-inhibiting combinations between economically healthy independent voices. But UPN's operation as an independent voice isn't possible because UPN is failing. Indeed, if UPN were a local TV station and not a network, it would qualify for the "failing station" exemption to the local TV commercial duopoly rule.4/

As a leading opponent of concentration, MMTC has never before endorsed any exceptions to the dual network rule. However, we are faced here with the unusual situation in which the dual network rule may have an unintended consequence. If it were applied strictly, the rule could leave the public one fewer over-the-air network.5/ Such an outcome would reduce the diversity of program choices, particularly for the 18.6% of the public that still does not have or cannot afford cable, satellite or microwaved video.6/ If UPN fails,

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4/ Under the "failing station" waiver standard for local TV duopolies, two stations may merge "where at least one of the stations has been struggling for an extended period of time both in terms of its audience share and in its financial performance." Review of the Commission's Regulations Governing Television Broadcasting, 14 FCC Rcd 12903, 12938 ¶79 (1999). Indeed, the Commission has traditionally granted special relief to economically troubled facilities. See Second Thursday Corp. (Reconsideration), 25 FCC2d 112 (1970) (allowing sale of bankrupt station after designation for hearing, where wrongdoers do not profit from sale).

5/ In a contested case, two commissioners exhibited leniency in recognition of News Corp.'s creation of the Fox network. See Fox Television Stations, Inc., 11 FCC Rcd 5714, 5731 (1995) ("Fox II") (Separate Statement of Commissioner James H. Quello) and id. at 5733 (Separate Statement of Commissioner Andrew C. Barrett) (each relying on News Corp.'s creation of the much-desired fourth network as a principal reason to waive the 25% alien ownership restriction in Section 310(b) of the Communications Act.)

6/ This statistic is reported in Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming (Sixth Annual Report), 15 FCC Rcd 978, 983 ¶6 (2000).

the hardest-hit programming would be narrowcasted programming.[7/]

Notwithstanding the enormous need for minority-themed programming,[8/] there are only two principal over-the-air outlets for it -- UPN and WB.[9/] The civil rights community has struggled valiantly to increase that number. In recent years, MMTC and other

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7/ Two leading economists have explained that "as the number of channels continues to increase, advertisers who seek out minority groups will find the television medium increasingly attractive.... But...additional channels are a necessary condition for specialized programs to appear[.]" B. Owen and S. Wildman, Video Economics (1992) at 91-92.

8/ There is only one established African American-themed cable television provider, BET Holdings. The viewing patterns of African Americans are sharply different from those of White Americans. See "A Racial Divide Widens on Network TV", New York Times, December 29, 1998, A.1, Col. 3 (reporting that shows most watched by Whites are least watched by African Americans and vice-versa, with a great divide in terms of both casts and audiences of popular shows); J. Schement, "Thorough Americans: Minorities and the New Media", in A. Garmer, ed., Investing in Diversity: Advancing Opportunities for Minorities and the Media (1998) ("Garmer") at 87, 109 (finding that "most programs popular among African American audiences feature African American characters, while programs popular with whites feature white characters.") Furthermore, African Americans are more intense and loyal TV viewers than Whites. See L. Hall, "Racism or ratings? African Americans watch more TV, yet are often ignored by networks," Electronic Media, February 1, 1999, at 12 (reporting that in the Spring, 1999 season, "out of more than 115 shows airing on the six broadcast networks, only 18 shows feature an African American cast or lead character, with 10 of them airing on UPN and The WB.")

9/ See Screen Actors Guild, "African American Television Report," (June 7, 2000) (reporting that about 36% of all characters appearing on UPN and 22% of those on WB were African American, that half of the series regulars appearing on UPN were African American, and that every UPN program features an African American series regular.) UPN appears committed to serving the African American audience in the long run, inasmuch as it has retained its bloc of African American-themed programming even while attempting to reach other demographic groups. UPN's commitment to narrowcasting is worthy of credit because traditional network economics discourage narrowcasting. A narrowcasted program will be broadcast only when it will generate the same level of advertising dollars as the least attractive of several general audience programs. See S. Wildman and T. Karamanis, "The Economics of Minority Programming," in Garmer, supra at 47.

organizations have encouraged the four major networks to use such techniques as nontraditional casting to more thoroughly diversify their program offerings.[10] Three of the four major networks (CBS, NBC and Fox) have named diversity directors and appear to be making some progress in systematically responding to the needs of minority audiences. Still, very much remains to be done.[11] Consequently, in the predictable future, minority needs will have to be addressed largely by UPN and WB.

If UPN fails, programs like "The Parkers", "The Hughleys" and "Moesha" will have only one realistic opportunity to achieve national over-the-air distribution. UPN's demise would leave WB with extraordinary power over the terms and conditions African American-themed programs would have to accept, since noncarriage by an over-the-air network forces a program onto a cable channel that invariably reaches a far smaller audience.[12] Indeed, if UPN ceased to exist, many former UPN programs not picked up by WB would not be seen, even on cable, because cable advertising revenues typically are insufficient to pay the cost of high quality weekly series

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10/ In 1999, the four major networks were challenged by the NAACP and over 20 other organizations for programming all 26 new fall dramas and comedies with no minority lead characters.

11/ *See* Children Now, "Fall Colors II: How Prime-Time TV Deals with Race" (released July 18, 2000) (finding that while prime time television programs featured many African American characters that could be positive role models for viewers, African American characters are more likely to be integral to primary storylines in situations comedies than in drama, and characters of color tended to be shown either at work/school or home, while White characters were shown in both environments.) *See also* ADT Research, "Women, Men and Media: Who Speaks for America? Sex, Age & Race on the Network News" (1998), at 1 (reporting that a study of the ABC, CBS and NBC evening newscasts from January through June, 1998, by the publisher of "The Tyndall Report", found that White people represent 72% of the population but had 86% of the soundbites.)

12/ *See* *NPRM* at 5 ¶10.

production.[13] That would be a profound loss to the public, and a serious setback to the advancement and development of minority producers, directors, professionals and talent.

Surely it would be better to rely on minority ownership than on duopoly as a means of expanding program choices for consumers.[14] However, minority ownership of an over-the-air television network is apparently not attainable in the foreseeable future. Last year, MMTC undertook to recruit or cobble together a minority-owned entity to purchase and operate UPN.[15] In pursuing this objective, MMTC had discussions with several minority-owned companies capable of operating a television network. Although some of the companies were interested (and one undertook to explore financing), none of them was in a position to shoulder about $150,000,000 a year in red ink for several years.

13/ Otherwise, these programs would have been on BET.

14/ The Commission first recognized four decades ago that "service to minority groups" is in the public interest. Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 RR 1901, 1913 (1960). More recently, the Commission has fostered this objective by promoting minority ownership. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978). See H.R. Conf. Rep. 97-765, at 26 ("[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public"); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580-82 (1990) ("[e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.")

15/ MMTC operates the nation's only nonprofit, and only minority-owned, full service media brokerage. Presently, we have six clients. Although one of our clients is Infinity Broadcasting, which is controlled by CBS, MMTC acted entirely on its own in attempting to find a buyer for UPN.

This experience convinced us that UPN isn't viable for any independent ownership. UPN can only be preserved by an established network with O&Os and efficiencies from duopoly and vertical integration. That may be the awful truth, but it is the truth.

Consequently, the Commission should allow a narrow exception to its dual network policies[16/] to avoid the loss of UPN.[17/]

II. To Promote Racial Diversity In Programming, The Commission Should Not Require Program Separation

The NPRM asked commenters to suggest "possible merger conditions that might help safeguard our broadcast diversity goals while partially relaxing the dual network rule to achieve the potential net benefits identified in our economic analysis," such as "conditions that could maintain separation between the programming decisions of the two networks while still allowing them to achieve the efficiencies described in our economic analysis." Id. at 13 ¶¶28-29.

Commissioner Powell opposed programming conditions, viewing them presenting First Amendment concerns and being difficult to

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16/ MMTC expresses no opinion as to which network is most qualified to make a permanent home for UPN.

17/ Fortunately, there is nothing inherent in the nature of a duopoly that would tend to discourage narrowcasting. The reverse is true: because a duopolist doesn't compete against itself, a duopoly would probably enhance UPN's commitment to serving African Americans. A television network duopoly is likely to use its two networks to go after two distinct audience targets. See Video Economics, supra at 135 (predicting that multichannel services would produce "diffferentiated mixes of programs, each service appealing to a distinct viewer group whose programming tastes would only weakly correlate with the preferences of other viewer groups.") Indeed, local public television duopolies have done exactly that.

enforce.[18] We perceive no First Amendment concerns with program separation. Such a requirement, as in a newspaper JOA, would be content-neutral, and it would advance an important governmental interest (media diversity) that is unrelated to the suppression of free speech while not burdening substantially more speech than necessary to further that interest.[19] Nor do we believe that enforcing program separation would be particularly difficult. In newspaper JOAs, content separation is maintained without day-to-day government oversight. Journalism is too visible and ethical a profession to countenance cheating on federal regulations.

Nonetheless, we oppose a program separation requirement as applied to UPN. Within the television network universe, UPN is as close as there is to a surrogate for minorities.[20] A general audience network's staff's dialogue with UPN's well-integrated, minority-specialist staff would generate considerable potential for program diversity. Such interactions would help the general audience network appreciate the importance -- and learn the means -- of addressing issues of concern to minority communities. Indeed, these staff interactions are the linchpin of the Commission's

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18/ Concurring Statement of Commissioner Michael K. Powell.

19/ *See* *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"), *citing* *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). *Turner II* upheld under intermediate scrutiny a law requiring cable operators to carry broadcast programming in preference to other video programming, and *O'Brien* upheld a law banning draft card destruction against the requirement of a close fit to an important government interest.

20/ *See* Beverly Hills-Hollywood Branch of the NAACP, "As We Head into the Millennium, Shameful Hollywood Still Looks Pleasantville" (Press Release, October 8, 1999) (reporting results of survey showing that UPN is #1 in the industry in the number of African American writers employed on its programs.)

dead-on accurate appreciation of the value of diversity in broadcast employment.[21] Perhaps the best way to racially integrate CBS, NBC, ABC or Fox is to inoculate one of these networks with a dose of diversity from a specialized co-owned venture.[22]

To appreciate what would happen if the Commission enforced program separation, suppose that C-SPAN merged with BET, but C-SPAN employees couldn't walk across the hall and discuss current news events with their BET colleagues. How would that help the public?

A roughly comparable scenario actually existed in the world of network radio a generation ago. In 1973, Mutual formed the Mutual Black Network (MBN). Most MBN journalists had excelled in local Black radio news, but because of race discrimination they had never had a chance to work in general audience radio or perform on the national stage. Regrettably, Mutual imposed staff and content separation on its two networks. MBN journalists seldom had much interaction with their Mutual Radio colleagues in the same newsroom. Only rarely did an MBN story make it onto the Mutual Radio Network,

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21/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, 15 FCC Rcd 2329, 2350-51 ¶49 (2000), on appeal sub nom. Maryland-District of Columbia-Delaware Broadcasters Association v. FCC and USA, D.C. Cir. No. 00-1984 (oral argument scheduled for September 29, 2000) ("we believe that as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs than would be the case if stations employed few minorities and women" (fn. omitted)).

22/ Cf. Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F 2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) (recognizing that a minority broadcaster could offer nonminorities viewpoints they are unlikely to receive elsewhere); Dr. Martin Luther King Movement v. Chicago, 419 F.Supp. 667 (N.D. Ill. 1976) (emphasizing that African Americans' need for access to a White audience requires a municipality to permit a civil rights march in a White neighborhood).

and as far as we are aware, no MBN reporters ever went to work for Mutual Radio.

Mutual was ahead of its time to create an African American radio news network, and we do not mean to be overcritical with the benefit of hindsight. We offer this history to illuminate why the Commission should hardly countenance -- much less require -- program separation between a general audience network and a substantially minority-themed network.23/

III. The Commission Should Assure Itself That Network Duopolies Would Not Exacerbate The Anticompetitive Effects Of Local Duopolies

A network's fortunes can create ripple effects for local program choices. For example, a network duopoly's affiliation agreements could be written to create disincentives for the production of local programming by affiliates of the narrowcasting network. On the other hand, narrowcasting networks traditionally are more likely than the major networks to have minority-owned affiliates. If UPN does not survive, four minority-owned UPN affiliates will have to scramble for replacement programming.24/ Programming of equal quality may be unavailable.

23/ Indeed, the Commission should insist that a combined major network/UPN duopoly crossfertilize the two networks' programming arms rather than run UPN as a separate-but-unequal ghetto operation. Cf. Sweatt v. Painter, 339 U.S. 629 (1950) (holding that in order to educate a law student, a state must permit him to sit in a classroom and engage in dialogue with other law students of different backgrounds); contra, Plessy v. Ferguson, 163 U.S. 537 (1896). As the Commission recognized in the case of an AM-FM station which assigned all of the African American employees to work at the Black-formatted (and economically less lucrative) AM station, "such segregation would be contrary to the letter and spirit of our equal employment rules" (emphasis supplied). Independence Broadcasting Co., 53 FCC2d 1151, 1166 ¶19 (1975).

24/ UPN's minority owned affiliates serve Harlingen, Madison, San Diego and Toledo.

MMTC still has pending petitions for reconsideration of the 1999 TV Duopoly Report and Order and the 1999 Attribution Report and Order.25/ In its petitions, MMTC expressed concern that growing local TV industry competition was likely to freeze out minority owners and reduce the number of local voices.26/ The Commission should attend to MMTC's petitions when it rules in this proceeding, and assure itself that a network duopoly could not exacerbate any of the anticompetitive, anti-diversity consequences of local duopolies.

CONCLUSION

WHEREFORE, for the reasons set out above, the Commission should allow UPN to be owned by a major network. Furthermore, to promote diversity in network programming, the Commission should not impose program separation requirements on the two co-owned networks.

25/ Review of the Commission's Regulations Governing Television Broadcasting, supra; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 FCC Rcd 12559 (1999).

26/ MMTC's proposals included requiring sellers of failed, failing or unbuilt stations to market their properties so as to provide socially and economically disadvantaged small business concerns ("SDBs") with reasonable notice of their availability and a reasonable opportunity to bid; allowing the owners of any two same-market television stations or any TV/radio combination to sell the combination intact to an SDB, irrespective of the stations' ratings or the number of voices in the market; and grandfathering the nonattributable nature of EDP interests in most SDBs, irrespective of whether the EDP provider subsequently acquires other properties which otherwise would cause the EDP interest to be attributable to the EDP provider. See Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, in Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221 (filed October 18, 1999); Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, in Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150 (filed October 18, 1999).

Respectfully submitted,

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